

charged for such services to any other electronic publisher" expressly prohibits volume discounts.⁵³

Although no party contends that the Commission's existing Computer III and ONA requirements for nondiscriminatory access to unbundled network elements, network information disclosure, and nondiscrimination in the quality of service, installation and maintenance are inconsistent with the nondiscrimination requirements of Section 274(d), there is a disagreement among the parties, and even among the BOCs, as to whether the Commission should continue to apply its Computer III and ONA requirements to the BOCs' electronic publishing operations.⁵⁴ It cannot be disputed, however, that the BOCs today continue to possess monopoly power in their respective in-region local exchange market areas, and that they have both the ability and the incentive to gain an unfair competitive advantage over competing providers of electronic publishing services. The same market conditions that led the Commission to impose nondiscrimination requirements on the BOCs in its Computer III and ONA proceedings, therefore, remain fully applicable to the BOCs today, and there is nothing in Section 274(d) to suggest that Congress intended to displace the Commission's existing nondiscrimination requirements. Accordingly, the Commission should continue to apply its Computer III and ONA

⁵³ See Time Warner, pp. 21-22.

⁵⁴ Compare AT&T, pp. 21-22; BellSouth, p. 21; PacTel, p. 20; MCI, p. 6; Time Warner, p. 22; with YPPA, p. 9; USTA, p. 5; Bell Atlantic, pp. 12-13; NYNEX, p. 24.

nondiscrimination requirements to the BOCs' electronic publishing operations.

III. THE REQUIREMENTS OF SECTION 275 FOR THE PROVISION OF ALARM MONITORING SERVICES BY INCUMBENT LECS.

A. The Scope Of The Commission's Authority Over Alarm Monitoring Services Under Section 275.

The comments strongly support the conclusion that Section 275(b) prohibits any discrimination or cross-subsidization in the provision of alarm monitoring services by incumbent LECS without regard to state or LATA boundaries.⁵⁵ As Ameritech states, "Section 275(e) defines the term 'alarm monitoring service' without regard to LATA or other geographic boundaries," and the "nondiscrimination duties apply to all BOC alarm monitoring services, interLATA and intraLATA."⁵⁶ Accordingly, the Commission's authority under Section 275 to prevent discrimination or cross-subsidization by incumbent LECS applies to all alarm monitoring services, whether they are interstate or intrastate, interLATA or intraLATA.

B. The Nondiscrimination Requirements For Alarm Monitoring Services Under Section 275.

The comments also support the continued application of the Commission's Computer III and ONA nondiscrimination

⁵⁵ See AT&T, p. 22; AICC, pp. 3-11; Ameritech, pp. 30-31.

⁵⁶ Ameritech, pp. 30-31. Indeed, any interpretation of Section 275 that would exclude intrastate alarm monitoring services would completely nullify the safeguards established by Congress by permitting the BOCs to enter the alarm monitoring business in any state, including in-region states where they possess the bottleneck monopoly power over the services of competing alarm monitoring service providers, simply by locating an alarm monitoring central station in the state or LATA. See AICC, pp. 8-11.

requirements to the alarm monitoring services of the BOCs.⁵⁷ Similarly, consistent with Section 275(b)'s application to all incumbent LECs, the comments also support the application of the Commission's Computer III and ONA nondiscrimination requirements to the alarm monitoring services of all incumbent LECs that control substantial bottleneck facilities (e.g., GTE, SNET, and other Tier I LECs).⁵⁸

IV. PROCEDURES FOR COMMISSION ENFORCEMENT OF THE REQUIREMENTS OF SECTIONS 260, 274 AND 275.

Except for the BOCs, the comments strongly support the Commission's proposal (NPRM ¶¶ 79, 82) that the burden of proof in cases brought under the nondiscrimination provisions of Sections 260, 274 and 275 should shift to the respondent BOC or LEC once the complainant has made out a *prima facie* case -- that is, once the complainant has established specific facts which, if true, would constitute a violation of Sections 260, 274 or 275.⁵⁹ Such a shifting of the burden of proof is particularly appropriate in light of the short periods of time for Commission action established in these sections and the fact that the relevant information will almost certainly be in the possession of the respondent LEC or BOC rather than the complainant.

⁵⁷ See AT&T, p. 22; AICC, p. 28; MCI, pp. 7-8; BellSouth, p. 25. Although Ameritech concedes that "there is no inconsistency between the two [i.e., Section 275(b) and Computer III] requirements," it contends, incorrectly and without any factual showing, that there is no longer any need for the Computer III protections in light of Section 275(b). Ameritech, p. 32.

⁵⁸ See AT&T, p. 23; SBC, p. 21.

⁵⁹ See AT&T, p. 24; MCI, pp. 8-10; Voice-Tel, p. 14; AICC, pp. 29-30; ATSI, p. 10.

Moreover, shifting the burden of proof in these cases is consistent with the procedures previously employed by the Commission in discrimination cases arising under Section 202(a). Thus, it is well established that once a complainant alleging a violation of Section 202(a) establishes a *prima facie* case of discrimination, the burden shifts to the defendant carrier to show that the discrimination is justified and, therefore, not unreasonable.⁶⁰ A similar shifting of the burden is even more appropriate here in light of the fact that the nondiscrimination

⁶⁰ See BellSouth, p. 27 ("Under Section 202(a), the Commission has traditionally shifted the burden of proof to the defendant to demonstrate the reasonableness of its action when the complainant has satisfied its burden of proving that discrimination occurred"); MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990) ("If the services are 'like,' the carrier offering them has the burden of justifying the price disparity as reasonable").

provisions of Sections 260, 274 and 275 are absolute and do not permit any defense of reasonableness.⁶¹

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September 20, 1996

⁶¹ Contrary to the claims of some BOCs (PacTel, pp. 25-27; BellSouth, pp. 27-28; Ameritech, pp. 33-34), Section 7(c) of the APA (5 U.S.C. § 556(d)) does not prohibit shifting the burden of proof under Sections 260, 274 and 275. That provision only applies to adjudications required by statute to be determined "on the record" with a live hearing under 5 U.S.C. § 554. See 5 U.S.C. § 556(a)); American Trucking Assoc., Inc. v. United States, 344 U.S. 298, 319-20 (1953) ("we think it plain that the requirement" that the proponent of a rule or order shall have the burden of proof "applies only when hearings were required by the statute under which they were conducted to be made on the record and with opportunity for oral hearing"). No such procedure is required by Sections 260, 274 or 275. See also United States v. Florida East Coast Ry., 410 U.S. 224, 234-35 (1973) (statutory mandate that commission act "after hearing" insufficient to trigger requirements of 5 U.S.C. § 556); Railroad Comm'n of Texas v. United States, 765 F.2d 221, 227 (D.C. Cir. 1985) (statutory requirement that "Commission may take action . . . only after a full hearing" insufficient to make 5 U.S.C. § 556 applicable).

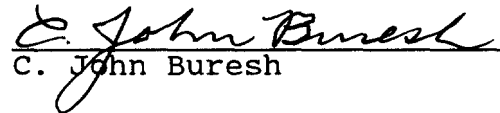
APPENDIX A

Parties Filing Comments in CC Docket No. 96-152

Alarm Industry Communications Committee (AICC)
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Association of Teleessaging Services International (ATSI)
AT&T Corp. (AT&T)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corp. (BellSouth)
State of California and California Public Utilities Commission
(California)
Cincinnati Bell Telephone Company (Cin. Bell)
Joint Parties: Bell Atlantic Companies and Newspaper Association
of America (Joint Parties)
MCI Telecommunications Corp. (MCI)
New York Department of Public Service (NY DPS)
Newspaper Association of America (NAA)
NYNEX Corp. (NYNEX)
Pacific Telesis Group (PacTel)
SBC Communications Inc. (SBC)
Time Warner Cable (Time Warner)
United States Telephone Association (USTA)
US West, Inc. (US West)
Voice-Tel
Yellow Pages Publishers Association (YPPA)

CERTIFICATE OF SERVICE

I, C. John Buresh, hereby certify that on this 20th day of September 1996 I caused the persons listed on the attached service list to be served by first-class mail, postage prepaid, with one copy of the foregoing Reply Comments of AT&T Corp.


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